

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HYLAND STEPHEN STERLING,

Defendant-Appellant.

UNPUBLISHED

April 22, 2008

No. 270838

Kalamazoo Circuit Court

LC No. 04-002417-FC

Before: Wilder, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

After defendant's first trial ended in a hung jury, a second jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b, for the July 25, 1995, shooting death of Robert O'Keefe. The court sentenced defendant to life in prison for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals, and we affirm.

I. Sufficiency of the Evidence

Defendant argues that the evidence at trial was insufficient to support his convictions. The elements of felony murder are: (1) the killing of a human being; (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm would be the probable result; (3) while committing, attempting to commit, or assisting in the commission of an enumerated offense, including larceny. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007). The evidence at trial established that O'Keefe was killed by a gunshot to his face that was fired from close range, and that O'Keefe's briefcase, which contained a large amount of cash, was missing after the offense. On appeal, defendant does not argue that the evidence failed to support the jury's determination that O'Keefe was murdered during the commission of a larceny. Rather, he argues that the evidence was insufficient to identify him as the killer. We disagree.

In reviewing a challenge to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). This Court should not interfere with the factfinder's role of determining the weight of evidence or the credibility of

witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court recognizes that it is the jurors' role to determine what inferences can be fairly drawn from the evidence, and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

The evidence at trial established that defendant and O'Keefe planned to purchase a bar known as The Warehouse. Defendant knew that an investor had given O'Keefe a large sum of money to invest in the purchase, but was pressuring him to return the money. The investor's attorney testified that he was in the process of arranging for repayment of the money. Another witness testified that a few days before O'Keefe's death, defendant was looking for O'Keefe and was angry because he believed that O'Keefe was backing out of the deal to buy The Warehouse. James Rushmore, defendant's former cellmate, testified that defendant told him that one of his associates was killed for backing out of the deal to purchase The Warehouse.¹

Defendant admitted that he saw O'Keefe retrieve money, which he assumed was part of the investment money, from O'Keefe's car trunk on the night before the offense. Further, Christina Laing, O'Keefe's live-in girlfriend, stated that defendant was with her, standing at the trunk of O'Keefe's car, when O'Keefe took a large sum of the money from a briefcase and split it with defendant about a month before the offense. Defendant admitted receiving the money. The bullets recovered from O'Keefe's body were .44-caliber, and witnesses testified that O'Keefe owned a .44-caliber handgun. Tricia Emme, O'Keefe's sister, testified that during an earlier bank robbery committed by defendant and O'Keefe, defendant carried O'Keefe's .44-caliber handgun. Christina Laing and O'Keefe's mother both testified that O'Keefe always kept his guns in his briefcase, which was always in his car trunk. Laurie Laing, one of O'Keefe's roommates, testified that when O'Keefe showed her the investment money in his briefcase, she saw the .44-caliber handgun in it. Defendant admitted that he knew that O'Keefe owned two guns. From this evidence, the jury could reasonably infer that defendant was aware that O'Keefe kept the large sum of money and his guns in his briefcase, which was kept in the trunk of his car. The jury could also infer that the .44-caliber gun in O'Keefe's briefcase was the weapon that was used to shoot O'Keefe.

Christina Laing testified that on July 25, 1995, the day of the offense, O'Keefe was alive when she left the house at 10:30 a.m. and was dead when she returned around 2:30 p.m. Officer Higby testified that he arrived at the house at 2:38 p.m. There was conflicting evidence whether

¹ We disagree with defendant's argument that there was no evidence of motive. The evidence that defendant was aware that O'Keefe received a large sum of money, that he was angry at O'Keefe because he believed that O'Keefe was attempting to back out of the deal to purchase The Warehouse, and that O'Keefe was considering giving back the intended purchase money, was sufficient to establish a motive for the offense. Regardless, the prosecution is not required to prove motive in order to establish the elements of the crime.

gunshots were heard before or after noon. Defendant did not have an alibi for the morning hours. Justin Roettger, O'Keefe's neighbor, saw a man matching defendant's general description looking into a car in O'Keefe's driveway on the morning of the offense. He drew a sketch of the shirt that the man was wearing. Three witnesses identified the shirt as similar to one they had seen defendant wear. Roettger testified that when he saw defendant at the house later that day, he looked like the man he saw earlier, except that his hair was shorter. Emme stated that defendant had said that he cut his hair that day. Several witnesses testified that defendant did not always have a clean-shaven head. Furthermore, defendant's fingerprints were found on both sides of O'Keefe's car, as well as the trunk. From this evidence, the jury could reasonably infer that defendant was the person who was observed outside O'Keefe's house on the morning of the offense, during a time span for which defendant did not have an alibi.

Christina Laing also testified that defendant overheard her tell O'Keefe that she had to work on the day of the offense. It was undisputed that defendant and O'Keefe were good friends at the time. The jury could have reasonably inferred that defendant knew that O'Keefe's other roommates and Christina Laing would be at work at the time of the offense. Although there was no direct evidence that defendant had been in the upstairs portion of the home before O'Keefe was killed, Christina and Laurie Laing both testified that defendant came up the stairs on the night of the offense looking for O'Keefe's blue book. Christina Laing also testified that defendant had been to O'Keefe's house before and sat near the kitchen table where the roommates kept their car keys and where Laurie Laing left her backpack. O'Keefe's briefcase where he kept his money and Laurie Laing's backpack were both missing after O'Keefe was killed. Additionally, both items were found in a dumpster near the two places that established defendant's afternoon alibi. Furthermore, defendant asked his live-in girlfriend, Laura Schmidt, to move his own briefcase before the police searched his home, and Rushmore testified that defendant admitted to being at the scene when O'Keefe was shot. From this evidence, the jury could reasonably infer that defendant was familiar with O'Keefe's house, was aware that O'Keefe would be the only person at the house on the morning of the offense, and knew where the car keys were kept, giving him access to O'Keefe's car where O'Keefe kept his briefcase.

The foregoing evidence and reasonable inferences arising from the evidence, viewed in a light most favorable to the prosecution, is sufficient to enable the jury to determine beyond a reasonable doubt that defendant was the person who murdered O'Keefe during the commission of a larceny. A person matching defendant's description was seen looking into O'Keefe's car, on which defendant's fingerprints were found, near the time of the offense. Defendant had no alibi for the morning hours, which were within the timeframe in which the offense could have been committed. There was also evidence that defendant knew where O'Keefe kept his car keys, knew O'Keefe would be alone at the time of the offense, and knew where O'Keefe kept his guns and the investment money. O'Keefe was killed with the same caliber handgun as the one he kept in his briefcase. The briefcase and Laurie Laing's backpack were both taken from the scene. These items were recovered in the vicinity of defendant's afternoon alibi, but O'Keefe's money and the .44-caliber handgun that were inside the briefcase were never recovered. Finally, defendant's former cellmate testified that defendant made statements indicating that an associate was killed for backing out of the deal to purchase The Warehouse. Although defendant argues that many of the witnesses against him were biased, the credibility of the witnesses was for the jury to resolve. The evidence was sufficient to support defendant's convictions.

II. Great Weight of the Evidence

Defendant also argues that the jury's verdict is against the great weight of the evidence and that the trial court erred in denying his motion for a new trial on this ground. We review the trial court's decision for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

A new trial may be granted if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.² *People v Musser*, 259 Mich App 215, 218-210; 673 NW2d 800 (2003).

Defendant's great weight argument focuses on issues involving witness credibility, the reliability of the witnesses' testimony in light of the fact that the offense was committed more than ten years earlier, the existence of conflicting evidence regarding whether defendant was at O'Keefe's house at the time of the offense, and the lack of direct evidence. Conflicting testimony and questions of witness credibility are insufficient grounds for granting a new trial. *Id.* at 219. The court must defer to the jury's determination unless directly contradictory testimony was so far impeached that it was deprived of all probative value, or the evidence contradicted indisputable physical facts or defied physical realities. *Id.* Although there was conflicting evidence at trial, the evidence supporting defendant's guilt had probative value. As discussed previously, the circumstantial evidence, and the reasonable inferences arising from it was based on multiple sources, from the testimony of several witnesses. The facts that support defendant's conviction do not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground.

III. Ineffective Assistance of Counsel

Defendant maintains that he was denied the effective assistance of counsel because his trial counsel made several errors in representing him at trial.

The trial court denied defendant's motion for a new trial on this ground after conducting an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). The question of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. We review the trial court's factual findings for clear error, and its constitutional determinations de novo. *Id.*

² Defendant asserts that the judiciary should adopt a more stringent standard of review in cold cases, particularly when the evidence is solely circumstantial. However, defendant offers no support for this argument other than his assertion that the passage of time results in unreliable memories. We decline to make his argument for him. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to the effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

A. Prison Photograph

Defendant contends that his trial counsel was ineffective for failing to object to the prosecutor's use of a photograph to depict the length of defendant's hair at the time of the offense. The parties agree that the photograph was taken after defendant's arrest for bank robbery, which defendant mentioned in his testimony at trial. Although the date the photograph was taken was not revealed to the jury, neither did the prosecutor suggest that the photograph was taken in 1995.

Additionally, we fail to see how defendant was prejudiced. The witnesses who were shown the photograph stated that defendant's hair was longer in 1995 than it was at the time of trial, but shorter than it appeared in the picture. Defendant testified that the photograph did not accurately depict his hairstyle in 1995 and he introduced photographs of his own from the fall and winter of 1994, and the spring of 1995, showing his hairstyle at the time. Accordingly, failure to object to the photograph did not constitute ineffective assistance.

B. Autopsy Photographs

Also, defendant says that counsel was ineffective for failing to object to the admission of autopsy photographs. He asserts that the photographs were unnecessary, because he did not dispute the cause of O'Keefe's death. However, the photographs were relevant to explain the pathologist's testimony that powder stippling around the wounds and a grazing wound on O'Keefe's hand revealed that O'Keefe's hand was near his face when he was shot in the cheek at close range. Although defendant did not dispute the cause of O'Keefe's death, the prosecutor may permissibly introduce all relevant evidence, including evidence that is probative of a matter that the defendant does not dispute. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). The prosecution bears the burden of proving all elements of the crime beyond a reasonable doubt, regardless of whether a defendant disputes or stipulates to an element. *Id.* at 69-70. Accordingly, the photographs were admissible, and defense counsel did not err in failing to object.

Defendant also avers that the photographs were prejudicial because their gruesome nature only served to inflame the jury. However, the probative value of the photographs outweighed the potential for prejudice because the powder stippling indicated a close range shot, which showed intent to kill. Gruesome photographs need not be excluded unless their probative value is substantially outweighed by the danger of unfair prejudice, even if they tend to arouse jurors' passions. *Id.* at 75-77. Although some of the jurors might have found the photographs disturbing, they are not so gruesome that they would have caused the jurors to abandon their

duty to follow their instructions to consider the evidence as a whole. Accordingly, defense counsel was not ineffective for not objecting to their admission.

C. Bad Acts Evidence

Defendant says that defense counsel was ineffective for failing to challenge the prosecutor's use of other bad acts evidence, specifically defendant's involvement in a bank robbery. Defense counsel explained that he used this evidence to explain why defendant was at the murder scene looking for O'Keefe's day planner and why he asked Schmidt to move his briefcase before the police searched his home, conduct that a jury might interpret as evidence of a cover-up or consciousness of guilt.³ Defense counsel also used the evidence to attack Emme's credibility, whose testimony was generally damaging to defendant. Although she participated in the bank robbery, she was not charged in the matter after she helped the FBI build its case against defendant. The trial court did not clearly err in finding that the evidence was helpful to defendant's case and that defense counsel's decision not to object to its admission was trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

D. Babbie Booker and Detective Amy Hicok

Defendant raises several claims regarding two potential witnesses. Defendant argues that defense counsel was ineffective for failing to conduct an investigation regarding Babbie Booker. Booker testified at defendant's posttrial hearing that she saw two men, one white and one black, exit O'Keefe's house around noon on the day of the offense. She stated that one of them was carrying a gun and a black bag. She stated that defendant was not the black man she saw. However, the evidence presented at the hearing also showed that Booker gave several statements to the police that contained significant inconsistencies, including the number of persons she saw, their race, and what they were carrying. Booker also had a criminal record and admittedly had a severe drinking problem in 1995, which lasted until at least 2006.

Defense counsel obtained location information from the police before trial and unsuccessfully attempted to find Booker on his own. When he tried to locate her before the first trial, his investigator was unsuccessful and informed him that chances of finding her were slim. Counsel explained that he did not request more aggressive police efforts in locating Booker or force such efforts by requesting a due diligence hearing because he wanted to locate her before the police did. He was concerned that if the police located her first, she would have given them another potentially inconsistent or unfavorable statement. Additionally, her general description of the black man she saw exiting O'Keefe's house, which she gave to the police in 1995, matched defendant's description. Counsel testified that he was also concerned about the police finding a witness that would turn out to be helpful to the prosecution. Therefore, he decided not to put more effort into finding Booker.

The trial court did not clearly err in finding that defense counsel had legitimate concerns regarding Booker's credibility and properly concluded that he made a strategic decision not to

³ Defendant claimed that his briefcase contained evidence of the bank robbery and he was concerned that O'Keefe's day planner book did too.

pursue her as a witness or request a due diligence hearing that might have led to more police involvement. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Even strategic choices made after an incomplete investigation are reasonable to the extent that reasonable professional judgments support the limitation on investigation. *Wiggins v Smith*, 539 US 510, 521-522, 528; 123 S Ct 2527, 2535, 2539; 156 L Ed 2d 471, 485, 489 (2003).

Defendant also argues that the prosecution and the police failed to provide reasonable assistance to locate Booker, contrary to their duties under MCL 767.40a(5), which provides that "[t]he prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness." The police provided defense counsel with an address for Booker. The law does not require a hearing to determine if the assistance provided was reasonable when there is no allegation that it was not. *People v Cook (On Remand)*, 266 Mich App 290, 295-296; 702 NW2d 613 (2005). Here, there was no request for a hearing. Thus, the question is whether defense counsel was ineffective for failing to request a due diligence hearing.

Defendant asserts that the trial court erred in finding that the prosecution exercised due diligence in attempting to locate Booker, improperly shifted the burden of proving prejudice from the lack of due diligence to defendant, and improperly made its own assessment of Booker's credibility. Because defense counsel advanced a strategic reason for not requesting a due diligence hearing, the trial court had to determine if counsel's decision was reasonable. The question whether the police assistance was reasonable was not addressed and did not need to be addressed by the trial court. Therefore, the trial court did not shift any burden to defendant. The court simply stated that had defendant desired more assistance, it would have been provided. The trial court's comments regarding Booker's credibility were made in the context of explaining that defense counsel's decision not to pursue her, or request additional police efforts to locate her, was reasonable. As previously explained, the trial court did not clearly err in finding that counsel reasonably was concerned about Booker's credibility, and that he did not request a due diligence hearing as a matter of trial strategy.

Defendant further argues that counsel was ineffective for failing to call Detective Amy Hicok as a witness. We disagree. Detective Hicok could not say whether defendant was the person she saw walking near the crime scene carrying a backpack-type bag, but her general description of the man she saw matched defendant and defendant did not have an alibi for the timeframe during which Detective Hicok saw the man. The trial court did not err in finding that counsel's decision not to call her as a witness was reasonable trial strategy. Her identification testimony was equivocal and there was the possibility that her testimony might actually help the prosecution.

Defendant argues that counsel's trial strategy regarding Booker and Detective Hicok was not reasonable because it deprived him of a valid defense. Defendant asserts that their testimony was direct evidence that he was not at O'Keefe's house at the time of the offense. The failure to call witnesses constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A substantial defense is one that might have

made a difference in the outcome of the trial. *Id.* The trial court concluded that defendant was not prejudiced by the absence of the witnesses' testimony.

The defense theory at trial was that defendant was elsewhere at the time of the offense, and defendant was able to present that defense at trial. Defense counsel decided to present the defense without Booker or Detective Hicok. The witnesses' testimony did not support a different defense, and we do not believe that their testimony would have shored up the defense to such a degree that had the jury heard it, it might have decided the case differently. Booker had significant credibility issues. Her police statements were inconsistent with each other and with her testimony at the post-trial evidentiary hearing. Additionally, she had an admitted substance abuse problem at the time of the offense and for years afterward that could have affected her memory. Detective Hicok could not unequivocally state that defendant was not the person she saw near the crime scene. The testimony of both witnesses could have potentially helped the prosecution, because they gave descriptions of a person that matched defendant's general description.

Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Michael R. Smolenski